

AO 120 (Rev. 2/99)

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| TO: Mail Stop 8<br>Director of the U.S. Patent & Trademark Office<br>P.O. Box 1450<br>Alexandria, VA 22313-1450 | <b>REPORT ON THE<br/>FILING OR DETERMINATION OF AN<br/>ACTION REGARDING A PATENT OR<br/>TRADEMARK</b> |
|---|---|

In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Northern District of California on the following  Patents or  Trademarks:

|                         |                |  |
|-------------------------|----------------|--|
| DOCKET NO.              | DATE FILED     | U.S. DISTRICT COURT  |
| <u>CV 09-03831 MEJ</u>  | <u>8/20/09</u> | <u>Northern District of California, San Francisco Division</u> |
| PLAINTIFF               |                | DEFENDANT  |
| <u>NEUROSKY, INC.</u>   |                | <u>NEUROTEK, LLC, ET AL</u>                                    |
| PATENT OR TRADEMARK NO. |                | DATE OF PATENT OR TRADEMARK                                    |
| <u>1 5,983,129</u>      |                |  |
| 2                       |                |  |
| 3                       |                |  |
| 4                       |                |  |
| 5                       |                |  |

In the above—entitled case, the following patent(s) have been included:

|                         |  |                               |  |  |
|-------------------------|--|-------------------------------|--|--|
| DATE INCLUDED           | INCLUDED BY  |                               |  |  |
|                         | <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading |                               |  |  |
| PATENT OR TRADEMARK NO. | DATE OF PATENT OR TRADEMARK  | HOLDER OF PATENT OR TRADEMARK |  |  |
| 1                       |  |                               |  |  |
| 2                       |  |                               |  |  |
| 3                       |  |                               |  |  |
| 4                       |  |                               |  |  |
| 5                       |  |                               |  |  |

In the above—entitled case, the following decision has been rendered or judgement issued:

|                    |  |
|--------------------|--|
| DECISION/JUDGEMENT |  |
|--------------------|--|

|                    |                   |                 |
|--------------------|-------------------|-----------------|
| CLERK              | (BY) DEPUTY CLERK | DATE            |
| Richard W. Wicking | Gloria Acevedo    | August 25, 2009 |

Copy 1—Upon initiation of action, mail this copy to Commissioner    Copy 3—Upon termination of action, mail this copy to Commissioner  
 Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner    Copy 4—Case file copy

1       45. On information and belief, on July 19, 2009, Ryan sent an email to Suto with the  
2 subject line "Last Chance to Negotiate Patent License Before Litigation."

3       46. Ryan intended to send and did send his July 19, 2009 email to California to Suto,  
4 NeuroSky's counsel. Suto received Ryan's June 14, 2009 email in California.

5       47. In the July 19, 2009 email from Ryan to Suto, Ryan explained the details of  
6 Defendants' patent infringement allegations against NeuroSky's products, presenting detailed,  
7 limitation-by-limitation infringement analysis for at least claims 1, 11 and 12 of the '129 Patent.

8       48. Also in the July 19, 2009 email from Ryan to Suto, Ryan again threatened  
9 NeuroSky's ability to raise capital stating that unless the negotiations between Defendants and  
10 NeuroSky continue in a positive manner, Defendants' patent infringement allegations were  
11 "substantial and material which would need to be adequately disclosed to [NeuroSky's]  
12 investors."

13       49. Also in the July 19, 2009 email from Ryan to Suto, Ryan also indicated that  
14 Defendants' convictions concerning their alleged infringement theories remained strong, so much  
15 so that if NeuroSky did not take a license then, the result for NeuroSky would be severe: "The  
16 process of answering your questions has enhanced Dr. Cowan's convictions about the strength  
17 and value of NeuroTek's case, and thereby, his certainty that NeuroTek would successfully  
18 defend any threatened business interference slap-back tort counterclaim NeuroSky would be  
19 expected to assert in NeuroTek's patent infringement action. If NeuroTek has to execute the  
20 formal contingency fee contract with Mr. Nemazi involving his patent infringement  
21 representation, the ultimate royalty costs to NeuroSky would immediately escalate. NeuroSky  
22 needs to also understand that there would also be no guarantee that, following the entry of any  
23 NeuroTek's district court judgment in its favor that any license agreement with NeuroSky would  
24 ever be approved for NeuroSky unless, somehow the court would so order (which I understand  
25 would not be normally ordered)."

26       ///

27       ///

28       ///

1       50. Also in his July 19, 2009 email, Ryan indicated that time was running out on  
2 NeuroSky to take a license: "Dr. Cowan is insistent that the NeuroTek patent is being violated by  
3 NeuroSky and his patience is wearing thin with your client's stalling. If NeuroSky does not move  
4 forward with constructive licensing negotiations in the time frame described in this e-mail, then  
5 any cease-and-desist letters deemed appropriate would be sent out when and as described in my  
6 June 14th e-mail."

7       51. NeuroSky believed the threats made in Ryan's July 19, 2009 email to Suto  
8 indicated that the threat of Defendants filing a patent lawsuit against NeuroSky was even more  
9 imminent as Defendants indicated they had completed a limitation-by-limitation infringement  
10 analysis of NeuroSky's products, retained patent litigation counsel on a contingency-fee basis and  
11 indicated that they were contemplating sending cease-and-desist letters to NeuroSky and its  
12 customers. Ryan's July 19, 2009 email is attached as Exhibit B (filed under seal)<sup>1</sup>.

13       52. On information and belief, on July 24, 2009 Cowan sent an email to Sullivan and  
14 Hyver forwarding Ryan's July 19, 2009 email to Suto, and related additional emails from Ryan to  
15 Suto, threatening NeuroSky with a patent litigation that would severely disrupt NeuroSky's  
16 business: "FYI . . . You are skating on very thin ice. Our offer is more than fair and reflects our  
17 discussions accurately. We will not put off this lawsuit further because we believe that our timing  
18 with respect to Mattel and Uncle Milton is optimal now. You must stop stalling or you will  
19 sacrifice your years of work on these projects."

20       53. NeuroSky believed that the language used and threats made in Cowan's July 24,  
21 2009 email to Sullivan and Hyver indicated that the filing of a patent infringement lawsuit by  
22 Defendants was clearly imminent. Cowan's July 24, 2009 email to Sullivan & Hyver is attached  
23 as Exhibit C (filed under seal).<sup>2</sup>

24       54. Cowan intended to send and did send his July 24, 2009 email to Sullivan and  
25 Hyver at NeuroSky in San Jose, California. Sullivan and Hyver each received Cowan's July 24,  
26 2009 email in California via their NeuroSky email addresses.

27  
28 <sup>1,2</sup> Pending the Court's ruling on NeuroSky's pending motion to file under seal.

1       55. On information and belief, Cowan attached Ryan's July 19, 2009 email to Suto to  
2 Cowan's July 24, 2009 email to NeuroSky's Sullivan and Hyver intentionally to repeat and  
3 reinforce the threats Defendants intended to communicate to NeuroSky as contained in Ryan's  
4 email.

5       56. Over the course of the last approximately 22 months, on multiple occasions, both  
6 in-person in meetings held in San Jose, California and via correspondence specifically directed to  
7 NeuroSky personnel and its counsel all in California, Defendants have accused NeuroSky of  
8 infringing the '129 patent and have provided specific analysis explaining the bases for  
9 Defendants' allegation that NeuroSky ThinkGear products infringe at least claims 1, 11 and 12 of  
10 the '129 Patent.

11       57. Similarly, over the course of the last approximately 22 months, on multiple  
12 occasions, both in-person in meetings held in San Jose, California and via correspondence  
13 specifically directed to NeuroSky personnel and its counsel all in California, Defendants have  
14 repeatedly requested that NeuroSky take a license to practice the '129 Patent or else Defendants  
15 would sue for patent infringement and send letters to NeuroSky's customers alleging infringement  
16 and demanding they cease and desist from doing business with NeuroSky.

17       58. NeuroSky, while disputing Defendants' allegations of patent infringement, views  
18 Defendants' threats as imminent and significant as Defendants apparently seek to shut down  
19 NeuroSky's core business and/or extract undue monetary payments, via costly litigation.  
20 Similarly, it appears that Defendants seek to interfere with NeuroSky's customer relationships and  
21 its ability to raise additional capital.

22       59. NeuroSky does not believe that it needs a license to the '129 Patent because  
23 NeuroSky's ThinkGear products clearly and objectively do not infringe any valid claim of the  
24 '129 Patent. Moreover, NeuroSky believes the claims of the '129 Patent clearly and objectively  
25 lack validity.

26       60. NeuroSky is not registered to do business in Kentucky. NeuroSky does not have  
27 any operations based in Kentucky. NeuroSky does not have any personnel assigned to  
28

1 specifically sell product or solicit customers in Kentucky. NeuroSky personnel have not traveled  
2 to Kentucky to conduct or discuss any business activity with anyone in residing in Kentucky.

3 **JURISDICTION AND VENUE**

4 61. This is an action for declaratory judgment pursuant to the Declaratory Judgment  
5 Act and the patent laws of the United States. See 28 U.S.C. §§ 2201 and 2202; 35 U.S.C. §§ 100  
6 *et seq.*

7 62. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and  
8 1338(a).

9 63. This Court has personal jurisdiction over Defendants. Defendants have committed  
10 acts within this judicial district giving rise to this action and have established minimum contacts  
11 with the forum such that the exercise of jurisdiction over Defendants would not offend traditional  
12 notions of fair play and substantial justice.

13 64. Venue is proper in this district court under at least 28 U.S.C. §§ 1391(b) and (c).

14 65. An actual and justiciable controversy exists between NeuroSky, on the one hand,  
15 and Defendants on the other, as to Defendants' assertions that NeuroSky allegedly is infringing  
16 valid claims of the '129 Patent and have threatened to take action against NeuroSky to stop its  
17 marketing, offering to sell and selling of its ThinkGear products, and NeuroSky's belief that it has  
18 not infringed and does not infringe, either directly or indirectly, any valid enforceable claim of the  
19 '129 Patent, either literally or under the doctrine of equivalents, such that it has the right to  
20 conduct business without need of a license to the '129 Patent.

21 **COUNT 1**

22 **DECLARATORY JUDGMENT OF NO INFRINGEMENT OF THE '129 PATENT**

23 66. NeuroSky repeats and realleges the allegations of paragraphs 1–65 as if set forth  
herein.

24 67. NeuroSky has not infringed and is not now infringing either literally or by  
application of the doctrine of equivalents any claim of the '129 Patent.

68. NeuroSky has not and is not now inducing or contributing to the infringement of any claim of the '129 Patent by others either directly or indirectly, or literally or by application of the doctrine of equivalents.

69. An actual and justiciable controversy exists between Defendants' and NeuroSky regarding the alleged infringement of the '129 Patent based on Defendants' allegations that NeuroSky allegedly infringed and continues to infringe valid claims of the '129 Patent.

70. This is an exceptional case pursuant to 35 U.S.C. §285 entitling NeuroSky to an award of its attorneys' fees.

## COUNT 2

## DECLARATORY JUDGMENT FOR INVALIDITY OF THE '129 PATENT

71. NeuroSky repeats and realleges the allegations of paragraphs 1–65 as if set forth herein.

72. Each claim of the '129 Patent is invalid because the patent and the alleged invention therein fails to comply with the requirements of 35 U.S.C. §§ 101 *et seq.*, including but not limited to, 35 U.S.C. §§ 101, 102, 103 and/or 112.

73. An actual and justiciable controversy exists between Defendants and NeuroSky regarding the alleged validity of the '129 Patent based on Defendants' allegations that NeuroSky allegedly infringed and continues to infringe valid claims of the '129 Patent.

74. This is an exceptional case pursuant to 35 U.S.C. § 285 entitling NeuroSky to an award of its attorneys' fees.

**DEMAND FOR JUDGMENT**

WHEREFORE NeuroSky respectfully requests that this Court enter the following relief:

1. A declaratory judgment that NeuroSky is not liable for past or current infringement of the '129 Patent;

2. A declaratory judgment that the claims of the '129 Patent are invalid;

3. A declaration that this case is exceptional under 35 U.S.C. § 285;

4. A judgment in favor of NeuroSky for its attorneys' fees, costs and expenses

in this action; and

1           5. A judgment in favor of NeuroSky for such further, necessary and proper  
2 relief as this Court may deem just and proper.

3 Dated: August 20, 2009

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ORIGINAL

FILED

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MICHAEL W. WILHELMUS

CLERK'S OFFICE

U.S. DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

6 Attorneys for Plaintiff  
NeuroSky, Inc.

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

11 NEUROSKY, INC.,

12 Plaintiff,

13 v.

14 NEUROTEK, LLC, MINDWAVES, LTD.  
and JONATHAN D. COWAN,

15 Defendants.

16 Case No. 03831MJ

17 COMPLAINT FOR DECLARATORY  
JUDGMENT OF NON-INFRINGEMENT  
AND INVALIDITY OF U.S. PATENT  
NO. 5,983,129

17 Plaintiff NeuroSky, Inc. ("NeuroSky") brings this action against Defendants NeuroTek,  
18 LLC, Mind Waves, Ltd. and Jonathan D. Cowan ("Cowan") for a declaration of non-infringement  
19 by NeuroSky's ThinkGear-based products and similar products and a declaration of invalidity,  
20 each with regard to United States Patent No. 5,983,129 issued to Cowan.

21 **THE PARTIES**

22 1. NeuroSky is a Delaware corporation, with its principal place of business at 125 S.  
Market, Suite 900, San Jose, California, 95113.

24 2. NeuroSky is a leading biosensor company, making Brain-Computer Interface  
25 technologies available to developers across a wide range of industries. Brain-Computer Interface  
26 (BCI) technology comes from monitoring the electric pulses emitted by neurons firing in the  
27 brain.

3. Upon information and belief, defendant NeuroTek, LLC ("NeuroTek") is a manager-managed Delaware limited liability company having its principal place of business at 1103 Hollendale Way, Goshen, Kentucky, 40026.

4. Upon information and belief, NeuroTek also does business as Peak Achievement Training, and maintains a website at <http://www.peakachievement.com>.

5. Upon information and belief, defendant MindWaves, Ltd. ("MindWaves") is a Kentucky limited partnership having its principal place of business at 1103 Hollendale Way, Goshen, Kentucky, 40026. Upon information and belief, NeuroTek owns or possesses a controlling interest in MindWaves.

6. Upon information and belief, NeuroTek, Peak Achievement Training and/or Mind Waves manufacture and sell performance enhancement biofeedback products under the Peak Achievement Trainer trademark.

7. Upon information and belief, defendant Cowan is the Manager and/or Chief Executive Officer of NeuroTek and a General Partner of MindWaves.

## THE PATENT IN SUIT

8. Cowan is the named inventor of United States Patent No. 5,983,129 (the "129 Patent") entitled "Method for Determining An Individual's Intensity of Focused Attention and Integrating Same Into Computer Program," issued November 9, 1999, a copy of which is attached hereto as Exhibit A. According to the assignment record at the United States Patent and Trademark Office ("USPTO") Cowan had previously assigned the '129 Patent to MindWaves but apparently now the current assignee of the '129 Patent is NeuroTek. The '129 Patent is attached as Exhibit A.

9. Defendants have held themselves out as owners of the '129 Patent and possessed of all rights relating to the enforcement of the patent. On information and belief, one or more Defendants are owners and possessed of all rights relating to enforcement of the '129 Patent.

10. According to the information provided by Defendants and/or Defendants' counsel, the Peak Achievement Training products allegedly utilize the alleged inventions of the '129 Patent.

1           11. Defendants have specifically accused NeuroSky of making, using, selling, offering  
2 to sell and importing products that allegedly infringe several claims of the '129 Patent and  
3 provided detailed explanation of the bases for Defendants' claims of infringement.

4           12. On information and belief, Cowan first contacted NeuroSky in early 2008, by  
5 sending email to Stanley Yang, NeuroSky's CEO, and Greg Hyver, NeuroSky's Vice President of  
6 Business Development, at NeuroSky seeking a meeting a conference Cowan attended in  
7 Monterey, California. Cowan intended to send and did send his early 2008 email to Yang and  
8 Hyver at their place of business, NeuroSky, knowing that NeuroSky was based in California and  
9 intending for his communications to be received in California. Yang and Hyver received the  
10 Cowan's early 2008 email in San Jose, California via their NeuroSky email addresses.

11          13. On information and belief, on or about October 9, 2008, Cowan emailed Hyver  
12 seeking a meeting with NeuroSky at NeuroSky's headquarters in San Jose, California to discuss  
13 possible collaborations and to incorporate his patented technology into NeuroSky's products.  
14 Cowan intended to send and sent his October 9, 2008 email to Hyver in California via Hyver's  
15 NeuroSky email account. Hyver received Cowan's October 9, 2008 email in California.

16          14. On information and belief, on October 20, 2008, Cowan met with Hyver at  
17 NeuroSky's headquarters in San Jose, California. During the meeting Cowan and NeuroSky  
18 discussed their respective technologies and possible business collaborations. During the meeting  
19 Cowan specifically sought details concerning the algorithms used in the ASIC chips NeuroSky  
20 develops. On information and belief, in soliciting information about the algorithms used in  
21 NeuroSky products, Cowan sought to learn information to assist him in asserting his patent  
22 infringement theories against NeuroSky.

23          15. On information and belief, after the October 20, 2008 meeting, Hyver suggested to  
24 Cowan that further discussions with Cowan, MindWaves and NeuroTek would require the use of  
25 a Non-Disclosure Agreement. The parties negotiated the terms of for a proposed NDA over the  
26 course of the next month and a half, exchanging numerous emails and telephone calls. During  
27 this period of negotiations between Defendants and NeuroSky, each time Cowan emailed  
28 NeuroSky, Cowan intended to send and sent his email correspondence to NeuroSky personnel

1 located in California, where such correspondence was received. Also during this period of  
2 negotiations, each time Cowan telephoned NeuroSky personnel, Cowan intended to call and did  
3 call NeuroSky personnel located in California, where such calls were received.

4 16. On information and belief, on or about December 8, 2008, NeuroSky indicated that  
5 it would not be able to enter the then current version of the proposed NDA.

6 17. On information and belief, on December 8, 2008 in response to Hyver's email of  
7 the same day, Cowan responded by sending an email to Hyver indicating that "it would be much  
8 better to join forces than to argue (and fight) among ourselves." On information and belief, in  
9 that same email Cowan further indicated that he was pursuing other licensing targets for his '129  
10 patent and that he would be hiring a patent attorney to assist him with his negotiations with  
11 NeuroSky.

12 18. Cowan intended to send and did send his December 8, 2008 email to Hyver at  
13 NeuroSky in San Jose, California. Hyver received Cowan's December 8, 2009 in California via  
14 his NeuroSky email address.

15 19. NeuroSky viewed Cowan's December 8, 2009 assertion that he would retain a  
16 patent attorney to assist him in his negotiations with NeuroSky concerning his '129 Patent and his  
17 other comments in his email as a clear indication that Cowan believed that NeuroSky infringed  
18 the '129 Patent and that Cowan would seek to force NeuroSky to take a license to the '129 Patent.

19 20. On information and belief, over the last approximately two years, Cowan has  
20 approached other entities in California, including visiting their places of business and sending  
21 them correspondence at their places of business in California, to accuse them of infringement of  
22 his '129 Patent and/or to seek licensing agreements with them concerning Cowan's '129 Patent.

23 21. On information and belief, from December 2008 through April 2009, negotiations  
24 continued between various personnel at NeuroSky and Cowan. Cowan's emails and telephone  
25 calls were specifically directed to NeuroSky personnel located and operating on NeuroSky's  
26 behalf in California, and who Cowan expected would receive his communications in California.  
27 On information and belief, by April 2009 Cowan had also designated Kevin Ryan as NeuroTek's  
28 counsel and had involved him in the ongoing patent licensing negotiations.

1           22. On information and belief, on December 17, 2008, Cowan emailed Hyver seeking  
2 to obtain a NeuroSky MindSet product so that Cowan could do some testing on it. On  
3 information and belief, by seeking to test NeuroSky products, Cowan was at attempting to collect  
4 information about NeuroSky's products to assist in him in pressing his infringement theories  
5 regarding his '129 Patent against NeuroSky.

6           23. Cowan intended to send and did send his December 17, 2008 email to Hyver at  
7 NeuroSky in San Jose, California. Hyver received Cowan's December 17, 2009 email in  
8 California via his NeuroSky email address.

9           24. On information and belief, on March 5, 2009, NeuroSky sent Defendants a  
10 MindSet product in response to Cowan's request.

11           25. On information and belief, on March 9 and 11, 2009, Cowan sent emails to  
12 NeuroSky's Vice-President of Worldwide Sales, Jim Sullivan, informing Sullivan that the headset  
13 product did not work and requesting a new sample product. Cowan's intended to send and did  
14 send his March 9 and 11, 2009 emails to Sullivan at NeuroSky in San Jose, California. Sullivan  
15 received Cowan's March 9 and 11, 2009 emails in California via his NeuroSky email address.  
16 NeuroSky sent Defendants a second MindSet headset to replace the one previously sent.

17           26. On information and belief, on March 22, 2009, Cowan emailed Sullivan to report  
18 on Cowan's testing of the MindSet headset and to provide suggestions to allegedly improve  
19 NeuroSky's product. Cowan's intended to send and did send his March 22, 2009 email to Sullivan  
20 at NeuroSky in San Jose, California. Sullivan received Cowan's March 22, 2009 email in  
21 California via his NeuroSky email address.

22           27. On information and belief, in mid-April 2009, Ryan and Cowan proposed by email  
23 another meeting at NeuroSky's headquarters in San Jose and again suggested that an NDA was  
24 necessary. Cowan and Ryan intended to send and did send their mid-April 2009 emails regarding  
25 a new in-person meeting and the proposed NDA to NeuroSky personnel at NeuroSky in San Jose,  
26 California. Hyver and Sullivan received Cowan's and Ryan's mid-April 2009 emails, that sought  
27 another in-person meeting at NeuroSky's San Jose, California headquarters, in California via their  
28 NeuroSky email addresses.

1           28. On information and belief, on April 30, 2009, Ryan emailed NeuroSky's  
2 California-based, outside counsel, Jeff Suto, providing a revised version of an NDA. Ryan  
3 intended to send and did send his April 30, 2009 email to Suto in California. Suto received  
4 Ryan's April 30, 2009 email in California.

5           29. On information and belief, on May 9, 2009, Suto sent Ryan an email rejecting the  
6 revisions to the then current version of the proposed NDA.

7           30. On information and belief, on May 9, 2009 Ryan responded to Suto's May 9, 2009  
8 email by sending Suto an email, which included a threat to sue NeuroSky for patent infringement:  
9 "Without this NDA signed by both parties, there will be no business negotiations whatsoever  
10 going forward and there is no need for us to travel to meet your clients in California, unless your  
11 client wants to put a big dollar patent licensing/royalty offer on the table. Our client will just  
12 move in other directions for its going-forward business model without NeuroSky...FYI, NeuroTek  
13 has previously engaged the law firm of Brooks Kushman P.C., a national patent infringement law  
14 firm, to aggressively pursue past known infringements relating to Dr. Cowan's U.S. Patent  
15 5,983,129."

16           31. Ryan intended to send and did send his May 9, 2009 email to Suto as NeuroSky's  
17 counsel knowing that Suto's office was located California. Suto received Ryan's May 9, 2009  
18 email threatening NeuroSky in California via his email address.

19           32. On information and belief, also on May 9, 2009, Cowan sent an email to  
20 NeuroSky's Sullivan and Hyver forwarding Ryan's email to Suto and reacting to the refusal to  
21 sign the proposed NDA by threatening to interfere in NeuroSky's business relationships:  
22 "Ultimately, this is a business decision and I feel strongly that you must dispense with Jeff's  
23 advice at this time in order to move the collaboration forward and avoid disastrous consequences.  
24 I am sure that you do not want our patent attorney writing cease and desist letters to Mattel, Uncle  
25 Milton, Toshiba, and others at this time." NeuroSky viewed Cowan's May 9, 2009 email as a  
26 threat to bring a patent litigation against NeuroSky and an unambiguous threat to interfere with  
27 NeuroSky's business relationships.

1           33. Cowan's intended to send and did send his May 9, 2009 email to Hyver and  
2 Sullivan at NeuroSky in San Jose, California. Hyver and Sullivan received Cowan's May 9, 2009  
3 email in California via their NeuroSky email addresses.

4           34. On information and belief, despite the disagreement about signing an NDA, on  
5 May 14, 2009, Cowan and Ryan visited NeuroSky's San Jose, California headquarters to meet  
6 with personnel from NeuroSky including Sullivan and NeuroSky's outside counsel, Suto.

7           35. During the May 14, 2009 meeting at NeuroSky's headquarters in San Jose, Cowan  
8 and Ryan explained both the technology described in the '129 Patent and the allegedly broad  
9 scope of the claims of the '129 Patent, along with the possible business collaborations they  
10 envisioned between NeuroSky and Defendants.

11          36. Cowan and Ryan also indicated during the May 14, 2009 meeting at NeuroSky's  
12 headquarters in San Jose, that any business deal or collaboration entered into between NeuroSky  
13 and Defendants must also include a license taken by NeuroSky to the '129 Patent. NeuroSky  
14 viewed Cowan and Ryan's May 14, 2009 presentation concerning the '129 patent and their  
15 demand for a patent license as a threat to sue NeuroSky for patent infringement, should NeuroSky  
16 not quickly take a license the '129 Patent.

17          37. On information and belief, on June 13, 2009, NeuroSky provided Defendants with  
18 a business proposal regarding both potential collaborations and a license to the '129 Patent.

19          38. On information and belief, on June 14, 2009, Ryan sent Suto an email rejecting  
20 NeuroSky's proposal and clarifying Defendants' position that their view of the alleged  
21 infringement was certain: "When we were at the San Jose office of NeuroSky in mid-May, it was  
22 made fairly obvious to us that NeuroSky was, in fact, clearly violating Claim 1 (and possibly  
23 some of the other related claims) of our client's patent, in that NeuroSky is inhibiting brainwave  
24 frequencies in the frontal lobe in its processes now being integrated into the computer chips being  
25 sold to Mattel and Uncle Milton for the floating balls toy." NeuroSky viewed Ryan's June 14,  
26 2009 email as indication that Defendants' intended to use a patent infringement lawsuit to  
27 interfere with NeuroSky's business and business relationships.  
28

1       39.     In the same June 14, 2009 email to NeuroSky's counsel, Ryan conveyed that  
2 Defendants intended to bring a patent infringement suit against NeuroSky, stating: "To update  
3 you a bit ... this past Monday afternoon, Jon Cowan and I had a lengthy conference call with  
4 John Nemazi to discuss having the national law firm of Brooks Kushman PC take all of the  
5 NeuroTek patent infringement cases (including the potential one against NeuroSky) upon some  
6 contingency basis, and during that call, Mr. Nemazi agreed to so.... [W]e would expect that,  
7 should the matter be turned over to the patent litigator, proper cease-and-desist letters would be  
8 sent to your client and its know customers." NeuroSky viewed Ryan's statements in Ryan's June  
9 14, 2009 email that Defendants had retained nationally-known patent litigation counsel on a  
10 contingency fee basis as an immediate, tangible and real threat by Defendants to sue NeuroSky  
11 for patent infringement in order to extract undue monetary rewards.

12       40.     Ryan intended to send and did send his June 14, 2009 email to California to Suto,  
13 NeuroSky's counsel. Suto received Ryan's June 14, 2009 email in California.

14       41.     On information and belief, on June 22, 2009, Cowan sent an email to NeuroSky's  
15 Sullivan suggesting that Sullivan should motivate NeuroSky to take a license to the '129 Patent  
16 and threatening "[i]f you do not make a very attractive offer, I will write to you that you need to  
17 advise your potential investors that there is no chance of anything but litigation and competition."

18       42.     Cowan also attached Ryan's June 14, 2009 email to Suto, described above to his  
19 June 22, 2009 email to Sullivan. On information and belief, Cowan attached Ryan's June 12,  
20 2009 email to Suto to Cowan's June 22, 2009 email to Sullivan intentionally to repeat and  
21 reinforce the imminent threat of a patent lawsuit against NeuroSky, as such threats were conveyed  
22 in Ryan's email.

23       43.     Cowan intended to send and did send his June 22, 2009 email to Sullivan at  
24 NeuroSky in San Jose, California. Sullivan received Cowan's June 22, 2009 email in California  
25 via his NeuroSky email address.

26       44.     NeuroSky viewed Cowan's June 22, 2009 email as an additional indication that  
27 Defendants intended to file a disruptive and costly patent lawsuit against NeuroSky.  
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